No. 89-400

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1989

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DAVID LUCAS, ET AL., APPELLANTS

*v.*

JUDY TOWNSEND, ETC., ET AL.

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTIONS PRESENTED

1. Whether a school board's decision to include funding for several projects in a single bond issue referendum question is a "standard, practice, or procedure with respect to voting" under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether the Attorney General precleared the school board's decision to include several projects in a single bond issue referendum question.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

### STATEMENT

1. Bibb County is located in central Georgia. According to the 1980 census, it has a population of approximately 150,000; most of the County's residents live in the city of Macon. Approximately 38% of the County's population, and 44% of Macon's population, is black. The Bibb County Board of Education and Orphanage (the School Board) has ten members. Eight of these members are elected from single-member districts; a representative of the Bibb County Board of Commissioners (the Commission) and the

mayor of Macon fill the other two voting seats on the School Board. Gov't D. Ct. Amicus Br. 3.

2. Georgia law grants authority to county school boards to seek the issuance of bonds when they "deem it [in] the best interests of education in the county." Ga. Code Ann. 20-2-430 (1987). All bond issues must be submitted to the voters of the school district for approval through a referendum. *Ibid.*; *id.* § 36-82-2. School boards must petition the county body authorized to levy taxes to place the question on the ballot. *Id.* § 36-82-1 *et seq.* The election on the question must be held "by the same persons, in the same manner, and under the same rules and regulations that elections for officers of the * * * political subdivision are held." *Id.* § 36-82-2. Not less than 30 days prior to the date of the election, the Commission must publish a notice of its occurrence. *Id.* § 36-82-1(b) (1987 & Supp. 1989). This notice must include "the principal amount of the bonds to be issued, the purpose for which the bonds are issued, the interest rate or rates which such bonds are to bear, and the amount of principal to be paid in each year during the life of the bonds." *Ibid.*

3. a. Beginning in 1986, the School Board undertook an extensive consideration of its capital improvement plans and priorities. In May 1987, the School Board decided to air condition existing buildings and to construct two new schools. The Board determined that funding the projects would cost $25 million and would require the issuance of general obligation bonds. On December 17, 1987, the School Board voted to seek a bond referendum on March 8, 1988, to raise $6.5 million for the air conditioning

project.[1] On January 4, 1988, the School Board voted to rescind its December 17, 1987, resolution and to seek a $25 million bond referendum on May 31, 1988, that would raise funds for the School Board's entire development plan. J.S. App. 30a; Gov't D. Ct. Amicus Br. 5-9.

b. On March 7, 1988, counsel for appellants—five black citizens registered to vote in Bibb County—requested that the Board rescind its vote of January 4, 1988. Appellants claimed that the May 31 election date, in contrast to the March 8 date, would adversely affect minority turnout. In addition, appellants contended that the combination of two bond issues in one question was an effort to manipulate the minority vote; they also objected that the Board had not submitted the referendum to the Justice Department for preclearance pursuant to Section 5 of the Voting Rights Act.[2] On March 30, 1988, the local authorities applied to the Attorney General for preclearance. On May 25, 1988, the Justice Department responded by indicating that the information submitted was inadequate and seeking additional information, par-

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[1] March 8, 1988, was "Super Tuesday"—the date of the Presidential primaries in many southern States. J.S. App. 30a.

[2] With respect to Georgia, Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, requires preclearance from the United States District Court for the District of Columbia or the Attorney General of the United States of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." Section 5 applies to a political subdivision of a covered State, such as Bibb County. See *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 117-135 (1978).

ticularly with respect to the scheduling of the referendum on May 31. J.S. App. 30a-32a.

c. On May 27, 1988, appellants filed suit, requesting an injunction to prevent the May 31 referendum. On that day, a three-judge court convened pursuant to 28 U.S.C. 2284(b) (1982 & Supp. V 1987) denied the motion for an injunction; the court concluded that there was no evidence that the standard, practice, or procedure for scheduling the referendum was different from that in force or effect when the Voting Rights Act was adopted and/or extended, and that, in any event, the evidence failed to demonstrate that the holding of the referendum on May 31 had the potential for diluting the minority vote. In addition, the court specifically rejected the Attorney General's regulatory interpretation (28 C.F.R. 51.17) that the scheduling of a referendum election was within the purview of Section 5. J.S. App. 17a-26a.

d. Appellants sought an injunction from this Court, and the United States filed a memorandum supporting their request. J.S. App. 29a-30a. On May 30, 1988, Justice Kennedy issued an injunction pending appeal. J.S. App. 27a-38a. Justice Kennedy determined that, in light of the Court's precedents and the Attorney General's regulation, the district court's ruling that the setting of the date for a special election was not subject to Section 5 preclearance was "most problematic." *Id.* at 36a-37a. He concluded that "four members of the Court would likely vote to note probable jurisdiction," that there was a "fair prospect" that the full Court would vote to reverse, and that irreparable harm would flow from denying injunctive relief. *Id.* at 37a.

The appeal was subsequently dismissed after the date of the election passed. Stip. 2.

4. a. On June 9, 1988, the Board rescheduled the referendum for November 8, 1988 (the date of the general election), voted to add a magnet high school project to the air conditioning and construction projects, and set the total amount of the bond referendum at $29 million. Stip. 2-3; J.S. App. 4a-5a. On July 27, 1988, counsel for Bibb County submitted the new election date to the Attorney General for preclearance. The application stated that "[t]he only 'change' involved in this proceeding, as defined in the regulations of the Attorney General has to do with the discretionary setting of the date for a bond referendum." Stip. Exh. 3, Submission at 4. In response, on September 26, 1988, the Justice Department notified the County that "[t]he Attorney General does not interpose any objection to the schedule for conducting the November 8, 1988 bond election." Stip. 3.

b. On October 11, 1988, appellants filed another motion for a preliminary injunction, requesting that the three-judge district court enjoin the referendum on the ground that the form of the referendum question had not been submitted to the Attorney General for preclearance. Appellants argued that the School Board's decision to submit the entire bond issue amount to the voters as a single question, rather than submitting separate questions for funding each project, was a "change affecting voting." J.S. App. 5a-6a.

c. The district court thereupon invited the United States to submit its views, and the United States then obtained leave to proceed as amicus curiae. J.S. App. 13a. The United States explained the Attorney General's view that, although the scheduling of the election had been a "standard, practice, or procedure"

requiring preclearance for a change, the decision about the "number of projects to be financed under one bonding authority" was "a normal legislative decision unrelated to the process of holding elections" and "the same kind of determination as the amount of bonded indebtedness required for a project, the interest rate the board is willing to pay or the term of the bonds" (Gov't D. Ct. Amicus Br. 16-17); thus it was not within the scope of Section 5 and did not require preclearance (*ibid.*). The United States rejected, however, appellees' contention that, if preclearance of the content of the referendum question was required, preclearance had been obtained. *Id.* at 17-20. The United States explained that only the scheduling of the election on November 8 had been precleared. *Ibid.*

d. On November 2, 1988, the district court denied plaintiffs' motion for a preliminary injunction. J.S. App. 4a-16a. Noting that the views of the Attorney General on the interpretation of the Voting Rights Act are entitled to substantial deference (J.S. App. 12a), the court agreed with the Attorney General's analysis, and ruled that the "form or structure" of a question on a bond referendum was not a standard, practice, or procedure with respect to voting under Section 5 (*id.* at 15a); "[t]he discretionary decision to submit one or more questions to the electorate is one properly left to the election process" (*id.* at 15a-16a). The School Board, the court concluded, had formulated the question in a manner consistent with Georgia law as it had existed both before and after the benchmark date provided by the Voting Rights Act, and had undertaken no "change" in practice. *Ibid.*

e. On November 8, 1988, the referendum took place as scheduled. The question presented to the

voters in the referendum read, in its entirety, "SHALL GENERAL OBLIGATION SCHOOL BONDS IN THE AMOUNT OF $29,000,000 BE ISSUED BY BIBB COUNTY?" The referendum carried by a narrow majority. J.S. App. 57a; Stip. Exh. 3, Commission Resolution, at 2 (July 5, 1988).

f. On March 7, 1989, the district court issued a final order entering judgment against appellants on their Section 5 claims. J.S. App. 1a-3a; 39a-40a. The court subsequently denied a motion for reconsideration. *Id.* at 41a-67a.

## DISCUSSION

The district court correctly held that the School Board's decision to combine more than one project in a single bond issue referendum was not a "standard, practice, or procedure with respect to voting" under Section 5. The district court's decision presents no substantial question under the Voting Rights Act, nor does it conflict with any decision of this Court or any other federal court. Plenary review is therefore unwarranted, and the decision should be summarily affirmed. If it is necessary, however, to consider appellees' continued claim that the content of the bond referendum question itself actually received preclearance, that claim is incorrect.

1. Congress enacted Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) as "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer* v. *United States*, 425 U.S. 130, 140 (1976) (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 57 (1975)). Section 5 bars political subdivisions in jurisdictions falling within the Act's

coverage from instituting changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" until they have obtained preclearance from the Attorney General or the United States District Court for the District of Columbia. See note 2, *supra*. The Attorney General has promulgated regulations for the enforcement of Section 5 (28 C.F.R. 51.1 *et seq.*), and this Court has emphasized that the Attorney General's interpretations of Section 5 are entitled to considerable deference. *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178-179 (1985); *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 131 (1978); *Perkins* v. *Matthews*, 400 U.S. 379, 390-394 (1971).

The language "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" (42 U.S.C. 1973c) includes all procedural rules affecting the casting of a ballot. *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565-567 (1969). In addition, Section 5 encompasses changes which affect or dilute the ability of minority voters to elect officials with decisionmaking authority. See, *e.g.*, *Lockhart* v. *United States*, 460 U.S. 125 (1983) (introduction of staggered terms and numbered posts); *Georgia* v. *United States*, 411 U.S. 526 (1973) (reapportionment); *Perkins* v. *Matthews*, 400 U.S. 379 (1971) (annexation); *Allen* v. *State Bd. of Elections*, 393 U.S. at 569-570 (1969) (switch to at-large election system; transfer of powers from elected to appointed officials).

At the same time, the content of legislation passed by local decisionmaking bodies which is unrelated to voting—such as what budget to approve or what programs to fund—is not subject to preclearance under

Section 5 of the Voting Rights Act. As long as the substance of such legislation does not itself effect a change in the method or effectiveness of the vote or the election process, it is not a "standard, practice, or procedure with respect to voting" under Section 5 of the Voting Rights Act.[3]

This fundamental distinction—between a standard, practice, or procedure with respect to voting and a policy decision which does not concern voting—reflects Congress's intent in enacting Section 5. Congress sought to curtail covered jurisdictions' resort to "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination." *Allen* v. *State Bd. of Elections*, 393 U.S. at 565 n.30 (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966)).[4]

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[3] When the substance of the legislation is a "change affecting voting," it will be reviewed under Section 5 before it goes into effect even if the Attorney General has precleared the procedure by which this legislation is instituted. See 28 C.F.R. 51.16 ("The failure of the Attorney General to interpose an objection to a procedure for instituting a change affecting voting does not exempt the substantive change from the preclearance requirement. For example, if the procedure for the approval of an annexation is changed from city council approval to approval in a referendum, the preclearance of the new procedure does not exempt an annexation accomplished under the new procedure from the preclearance requirement.").

[4] This Court has repeatedly recognized that Section 5 addresses enactments and procedures which relate to voting. See, *e.g.*, *Beer* v. *United States*, 425 U.S. 130, 138 (1976) ("The language of § 5 clearly provides that it applies only to proposed changes in voting procedures."); *Georgia* v. *United States*, 411 U.S. 526, 538 (1973) (Section 5 "essentially freezes the election laws of the covered States"); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566 (1969) ("Congress

The statute protects minorities against passage of substantive legislation adverse to their interests, which does not itself concern voting, only indirectly by protecting the effectiveness of their vote. See *Katzenbach* v. *Morgan*, 384 U.S. 641, 652 (1966) (Voting Rights Act, by protecting the right "preservative of all rights," will indirectly help minority constituencies gain nondiscriminatory distribution of public services). Thus, a state law that changes the method of selecting city councils from single-member districts to at-large voting is subject to Section 5; in contrast, adoption of a new sales tax, a particular budget, a road-building program, or any number of other substantive enactments which do not concern voting itself, is not subject to Section 5.[5]

This distinction is fully applicable to a referendum. Changes in the standards, practices, or procedures with respect to voting in a referendum require preclearance. According to the Attorney General's interpretation, covered subjects include changes in the rules concerning "the necessity of" offering propositions for approval by referendum (28 C.F.R. 51.13(j)); changes in the "methods" by which issues are offered for approval (*ibid.*); changes in the "practices or procedures to be followed" in the referendum (28 C.F.R. 51.17(a)); and the "discretion-

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intended to reach any state enactment which altered the election law of a covered State in even a minor way."); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315-316 (1966) (Section 5 "prescribes * * * the suspension of all new voting regulations pending review by federal authorities.").

[5] Passage of legislation with a discriminatory purpose and effect, however, would of course be separately cognizable under the Fourteenth Amendment to the Constitution.

ary setting of the date" for a referendum (28 C.F.R. 51.17(b)). The substantive content of a referendum itself, in contrast, is not subject to preclearance unless the substantive content of the referendum concerns voting.[6]

Appellants maintain that by combining the projects into a single referendum question, the Board made a decision about a "standard, practice, or procedure with respect to voting" which is covered by Section 5. J.S. 22-23. What they characterize as a "standard, practice, or procedure with respect to voting," however, is actually a question of educational and fiscal policy. The Board made a policy decision not to seek funding for several projects individually but to present them as a single package—to fund all projects at once or to fund none at all. The decision to combine these projects is a policy decision; it is essentially no different from a legislative committee's decision to include only a certain combination of projects in an appropriations bill, or not to include any of them. Just as that legislative decision would not require preclearance, so too the Board's decision concerning the content of a bond issuance referendum did not require preclearance because it was not a voting matter within the purview of Section 5.[7]

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[6] See note 3, *supra* (discussing 28 C.F.R. 51.16 requirement of preclearance for a "change affecting voting" resulting from a referendum).

[7] As discussed, the process of placing a question before the voters in a referendum is clearly a "standard, practice, or procedure with respect to voting." 28 C.F.R. 51.13(j); 28 C.F.R. 51.17(a); 28 C.F.R. 51.17(b). But there is no allegation that the procedural rules for presenting the referendum question (as opposed to the content of the referendum ques-

Appellants' contention that Section 5 applies to a decision regarding the content and wording of a referendum, which is not addressed to the voting or election process itself, is not supported by the language of the statute, its legislative history and purposes, this Court's opinions, or the Attorney General's administrative interpretations. The potential reach of appellants' argument, moreover, is enormous. Under appellants' theory, every decision about the wording and scope of a bond referendum would be a change in a "standard, practice, or procedure with respect to voting," and therefore subject to Section 5. Under appellants' theory, the proposal that they initially favored—a question on the ballot with an amount of $6.5 million, rather than $29 million—would itself be subject to preclearance. Indeed, appellants acknowledged in the district court that, under their theory, "no question * * * could be put in a bond referendum anywhere in any jurisdiction covered by the Act that would not have to be precleared." J.S. App. 106a. Thus, under appellants' argument, any budgetary or policy decision about categorizing and combining projects and programs, at least insofar as it is implemented through a referendum, is subject to Section 5. There is, however, no basis for transforming Section 5's concern with voting rights and procedures into a review of sub-

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tion itself) were in any way altered or required preclearance. Although appellants repeatedly refer to the scheduling of the referendum (J.S. 17-18, 29-30), the eventual scheduling of the election on November 8 received appropriate preclearance from the Attorney General and is no longer at issue in this case.

stantive policy decisions which do not themselves concern these voting rights and procedures.[8]

In sum, the district court's determination—that the decision about the content of the referendum question in this case was not a "standard, practice, or procedure with respect to voting" within the meaning of Section 5—is correct and should be summarily affirmed.[9]

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[8] Appellants attempt to analogize the Board's decision to offer the air conditioning and school construction issues as one question on the ballot with the enactment of anti-single shot voting rules. J.S. 26-27. Single shot voting, by allowing minority voters to concentrate their voting strength on one candidate by casting only one vote on a ballot that permits multiple choices, gives minority voting blocs a chance of electing the candidate of their choice in spite of their minority status if majority voters spread their votes among various other candidates. See *Thornburg* v. *Gingles*, 478 U.S. 30, 38 n.5 (1986). Institution of an anti-single shot voting rule thus is a change in a procedural rule affecting how voters can cast their ballots. In contrast, no such changed procedural rule was introduced here; the issue instead was the content of a bond referendum and the School Board's decision to adopt one funding proposal instead of another.

[9] The district court also found no "change" under Section 5 because decisions about formulating bond referendum questions were within the discretion of school boards in Georgia both before and after 1964. J.S. App. 15a. As the district court recognized elsewhere in its opinion, however, the fact that a decision has been committed to an entity's discretion does not mean that a discretionary decision can never be a "change" within the meaning of Section 5. J.S. App. 11a. See also *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985); 28 C.F.R. 51.17(b). The exercise of discretion may constitute a covered change under Section 5, but only if it involves a "standard, practice, or procedure with respect to voting." The district court's holding that the decision about the content of the bond referendum was not such a "standard, practice, or procedure" is clearly correct, and it is un-

2. For their part, appellees contend that even if the School Board's decision about the content of the referendum was subject to Section 5 preclearance, the Attorney General precleared the content of the question when he approved the appellees' choice of a date for the election. Mot. to Aff. 17-24. Not so. The content of the question was neither submitted to nor approved by the Attorney General.

This Court has made it clear that States must submit, in an "unambiguous" manner, changes for which they seek preclearance. *McCain* v. *Lybrand*, 465 U.S. 236, 249 (1984); *Allen*, 393 U.S. at 571. Applicants must specify what aspects of their statute or regulation they are submitting for preclearance (*McCain*, 465 U.S. at 256), and any ambiguity in the scope of the preclearance request is to be resolved against the submitting jurisdiction. *Id.* at 257. Moreover, the mere fact that the Attorney General has requested certain information that would seem to bear on the validity of changes for which preclearance has not been specifically requested "in no way suggest[s] that he approved changes that he was not requested to approve." *Id.* at 253.

Appellees specifically stated in their submission to the Justice Department that "the only 'change' involved in this proceeding * * * has to do with the setting of the date for a bond referendum." Stip. Exh. 3, Submission at 4. Similarly, the letter responding to this submission stated only that the "Attorney General does not interpose any objection to the schedule for conducting the November 8, 1988 bond election." Stip. 3. It is therefore clear that only the scheduling of the election was precleared.

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necessary to consider whether the lack of a "change" would furnish an independent basis for affirmance.

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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